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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ALEX D. JACKSON,	)	NO. CV 16-6033-SJO (E)
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION OF
	)	
WARDEN SUZANNE M. PEERY,	)	UNITED STATES MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

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This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

**PROCEEDINGS**

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on August 11, 2016. Respondent filed an Answer on December 6, 2016. Petitioner filed a Traverse on February 13, 2017.

1 **BACKGROUND**

2  
3 A jury found Petitioner guilty of second degree murder (Cal.  
4 Penal Code § 187(a)), cultivating marijuana (Cal. Health & Safety Code  
5 § 11358), possession of marijuana for sale (Cal. Health & Safety Code  
6 § 11359), and possession for sale of a controlled substance  
7 (psilocybin) (Cal. Health & Safety Code § 11378) (Reporter's  
8 Transcript ["R.T."] 2402-04; Clerk's Transcript ["C.T."] 477-80). The  
9 jury found true the allegations that Petitioner committed the drug  
10 offenses while armed with a firearm (R.T. 2402-04; C.T. 478-80).<sup>1</sup> The  
11 sentencing court imposed a term of 15 years to life on the murder  
12 count and a concurrent term of seven years on the remaining counts  
13 (R.T. 2717-18; C.T. 506-10, 513-16).

14  
15 The California Court of Appeal affirmed (Respondent's Lodgment 7;  
16 see People v. Jackson, 2016 WL 1583600 (Cal. App. Apr. 18, 2016)).  
17 The California Supreme Court summarily denied Petitioner's petition  
18 for review (Respondent's Lodgment 9).

19  
20 **SUMMARY OF TRIAL EVIDENCE**

21  
22 The following summary is taken from the opinion of the California  
23 Court of Appeal in People v. Jackson, 2016 WL 1583600. See  
24 Runningeagle v. Ryan, 686 F.3d 758, 763 n.1 (9th Cir. 2012), cert.  
25 denied, 133 S. Ct. 2766 (2013) (presuming correct statement of facts  
26 drawn from state court decision); Slovik v. Yates, 556 F.3d 747, 749

27  
28 <sup>1</sup> The jury found Petitioner not guilty of one count of  
assault with a deadly weapon (R.T. 2404; C.T. 481).

1 n.1 (9th Cir. 2009) (taking factual summary from state court  
2 decision).

3  
4 On May 9, 2013, the victim Pamela Devitt was taking her  
5 morning walk in Littlerock, when she was attacked by four  
6 pit bulls. A witness saw the victim on the ground,  
7 surrounded by the pit bulls, and called 911. When sheriff's  
8 deputies responded to the scene, one of the dogs was still  
9 biting the victim, but as the deputies came closer, that dog  
10 ran off into the desert. Deputies observed that the victim  
11 had puncture wounds on both arms and legs and her scalp had  
12 been torn back. When the paramedics arrived shortly  
13 afterwards, the victim was surrounded by a large amount of  
14 blood but was no longer actively bleeding. The paramedics  
15 determined she needed to be transported to the hospital  
16 immediately for a blood transfusion. She died on the way to  
17 the hospital.

18  
19 [Petitioner] lived with his mother, on a two acre lot,  
20 on 115th street in Littlerock. The incident occurred a few  
21 blocks from his house. One of the responding deputies  
22 remembered a prior incident when [Petitioner's] pit bulls  
23 had attacked horse riders and decided to go to  
24 [Petitioner's] house to look for the pit bulls. When the  
25 deputies made contact with [Petitioner], he told them he did  
26 not have any pit bulls and refused to allow them to check  
27 his house. After the deputies obtained a search warrant,  
28 four dogs were found inside his house (these four were later

1 determined to not have been involved in the incident), and  
2 the four pit bulls involved in the attack were found in  
3 [Petitioner's] garage. The four garage pit bulls had blood  
4 on their fur and DNA evidence established that the victim's  
5 blood was found on each of them.

6  
7 [Petitioner] had a history of taking in stray dogs  
8 dumped in the desert. Prior to the victim's death, dogs  
9 from [Petitioner's] house were involved in at least five or  
10 six incidents involving humans and horses. Elbert Walden  
11 worked as a United States Postal Service (USPS) rural  
12 carrier and [Petitioner's] house was on his route. One day  
13 in March 2012, as he drove up to [Petitioner's] mailbox, a  
14 pit bull on the outside of the fence began barking and  
15 jumping on his vehicle. Walden decided not to deliver the  
16 mail, and as he tried to drive away, the dog bit the front  
17 and back bumper of his mail truck. A "dog letter" was sent  
18 to [Petitioner's] house, notifying the occupants that if  
19 they did not keep their dogs inside between the hours of  
20 nine in the morning and six in the evening, USPS would  
21 discontinue mail delivery. [Petitioner] signed and returned  
22 the letter and the USPS continued to deliver mail without  
23 any subsequent problems.

24  
25 In January 2013, Epifanio Maldonado and Eladio Lopez  
26 were riding their horses past [Petitioner's] house.  
27 [Petitioner] was standing outside his property, accompanied

28 ///

1 by five to 10 pit bulls.<sup>2</sup> The dogs started barking and  
2 chasing the horses. [Petitioner] called the dogs but they  
3 did not return to him. The dogs bit the horses and  
4 Maldonado's horse kicked one of the dogs. [Petitioner] then  
5 threw rocks toward Maldonado. Maldonado's boots were bitten  
6 by the dogs and both horses sustained bite injuries on their  
7 legs. Maldonado called 911 after the incident and an  
8 officer responded to [Petitioner's] house, informing him  
9 that if the riders wanted him to pay for any medical  
10 treatment the horses might need, [Petitioner] would be  
11 responsible. [Petitioner] was upset that Maldonado and  
12 Lopez were riding their horses down his street because he  
13 thought it was a private road (the street is a dirt road  
14 that [Petitioner] and his neighbors maintain).

15  
16 Approximately a week after this incident, an Animal  
17 Care and Control officer responded to [Petitioner's] home  
18 regarding the complaint from Maldonado. The officer saw two  
19 pit bulls in [Petitioner's] yard. [Petitioner] was inside  
20 and came out to speak with the officer. He told the officer  
21 that his yard was secure and that his dogs had not gotten  
22 out. He went on to say, "I know there [are] reports of pit  
23 bulls that are in the area, and they are not mine." The  
24 officer noted that the two pit bulls in the yard were "very  
25 friendly" but cited [Petitioner] for not having them

---

26  
27 <sup>2</sup> Maldonado testified that there were five or more dogs.  
28 Lopez testified that there were somewhere between eight and 10  
dogs.

1 licensed. The officer did not see any other dogs at that  
2 time and after inspecting the fence, he noted that the fence  
3 looked secure.  
4

5 On April 3, 2013, Cheree Crisp was riding her horse by  
6 [Petitioner's] house. She testified that five pit bulls  
7 came through an opening in the fence and started biting her  
8 horse. One of the dogs jumped on the back of her horse,  
9 causing the horse to buck her off. The dogs continued to  
10 bite her horse so she let the reins go and the horse ran  
11 off. The dogs chased the horse and Crisp ran to a  
12 neighbor's house. The neighbor drove her back to her own  
13 house. Crisp and her friend Ronda Mortimer then went to  
14 find her horse and later called the sheriff's department. A  
15 deputy responded and took the report, but the record does  
16 not indicate whether the deputy followed up with  
17 [Petitioner]. Mortimer went to [Petitioner's] house the  
18 next day and told him her neighbor had been attacked by his  
19 pit bulls. [Petitioner] claimed he did not have any pit  
20 bulls. Crisp sustained a bite mark to her right calf and  
21 her horse had gashes on its back legs and skin missing from  
22 its nose and mouth.  
23

24 Towards the end of April 2013, Adalberto Farias was  
25 riding his horse by [Petitioner's] house when [Petitioner's]  
26 dogs started barking. He saw one dog jump the fence and  
27 then three others followed. He rode away and the dogs  
28 chased him but did not catch up to his horse. A week later

1 Farias rode by [Petitioner's] house again and the dogs again  
2 chased him but stopped following him after 400 or 500 feet.  
3 After the second incident, Farias stopped by the home of  
4 [Petitioner's] neighbor, Richard Torrez. Torrez was outside  
5 his house and Farias told him that [Petitioner's] dogs had  
6 gotten loose and chased him. Farias told Torrez that if  
7 [Petitioner] needed more fencing, he had some extra chain-  
8 link fencing and gave Torrez his address. Later, when  
9 [Petitioner] was driving past Torrez's house, Torrez told  
10 him that a person on his horse was angry about  
11 [Petitioner's] dogs getting out and said he had extra chain-  
12 link fence if [Petitioner] needed it.

13  
14 On approximately May 2, 2013, Karla Rosales and Rodrigo  
15 Rodriguez were riding tandem on their horse past  
16 [Petitioner's] house. [Petitioner's] dogs started barking  
17 and then two came out onto the street, followed by four  
18 others. Rosales testified that all six dogs looked like pit  
19 bulls, that they were biting at the horse's legs, and they  
20 bit the shoelace on Rosales' boot. She also testified that  
21 she saw [Petitioner] standing outside of his house but that  
22 he did nothing to stop the dogs. Rodriguez, who was sitting  
23 behind her on the horse, did not see [Petitioner] during the  
24 incident. Rosales and Rodriguez were able to ride away  
25 without sustaining any injuries, but their horse had bite  
26 marks on its leg.

27 ///

28 ///

1 Gloria Smith and Xavier Villegas moved into a house  
2 across the street from [Petitioner] in April 2013. Their  
3 mailbox was located in front of [Petitioner's] house, next  
4 to his mailbox. Smith testified that she wanted to move her  
5 mailbox to her side of the street because she often arrived  
6 home late at night and [Petitioner's] dogs made her nervous.  
7 Once she saw one of the dogs jumping [Petitioner's] fence  
8 and took a picture so that the USPS would allow her to move  
9 her mailbox. She testified that [Petitioner's] dogs had not  
10 been aggressive with her but that generally she was afraid  
11 of big dogs. Villegas testified that they had had no  
12 problem with [Petitioner's] dogs but then the prosecutor  
13 played a portion of a taped interview with Villegas in which  
14 he told the investigator that when they first moved in, the  
15 dogs had "rushed, they were attacking me and my wife and our  
16 dog." In the taped interview, he also told the investigator  
17 he would use a pellet gun to keep the dogs away and that he  
18 carried a machete with him when he walked across the street  
19 to retrieve his mail.

20  
21 [Petitioner] testified that in 2012 and again in early  
22 2013, he added fencing to his picket fence to make it more  
23 structurally sound and to prevent his dogs from getting out.  
24 Most, if not all, of the attacks occurred after the time  
25 that [Petitioner] claims the fence repairs were made.

26  
27 On May 9, 2013, after Animal Care and Control officers  
28 removed the dogs from [Petitioner's] home, sheriff's



1 deputies discovered a marijuana growing operation in  
2 [Petitioner's] bedroom, a firearm, and psilocybin (a  
3 hallucinogenic mushroom).  
4

5 (Respondent's Lodgment 7, pp. 2-6; see People v. Jackson, 2016 WL  
6 1583600 at \*1-3).  
7

#### 8 **PETITIONER'S CONTENTIONS**

9

10 Petitioner contends:  
11

12 1. The trial court allegedly violated Petitioner's due process  
13 rights by instructing the jury with a murder instruction (CALCRIM 520)  
14 without defining the specific legal duty that Petitioner allegedly  
15 failed to perform (Ground One); and  
16

17 2. The evidence allegedly was insufficient to support  
18 Petitioner's conviction for second degree murder (Ground Two).  
19

#### 20 **STANDARD OF REVIEW**

21

22 Under the "Antiterrorism and Effective Death Penalty Act of 1996"  
23 ("AEDPA"), a federal court may not grant an application for writ of  
24 habeas corpus on behalf of a person in state custody with respect to  
25 any claim that was adjudicated on the merits in state court  
26 proceedings unless the adjudication of the claim: (1) "resulted in a  
27 decision that was contrary to, or involved an unreasonable application  
28 of, clearly established Federal law, as determined by the Supreme

1 Court of the United States"; or (2) "resulted in a decision that was  
2 based on an unreasonable determination of the facts in light of the  
3 evidence presented in the State court proceeding." 28 U.S.C. §  
4 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v.  
5 Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09  
6 (2000).

7  
8 "Clearly established Federal law" refers to the governing legal  
9 principle or principles set forth by the Supreme Court at the time the  
10 state court renders its decision on the merits. Greene v. Fisher, 132  
11 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).  
12 A state court's decision is "contrary to" clearly established Federal  
13 law if: (1) it applies a rule that contradicts governing Supreme Court  
14 law; or (2) it "confronts a set of facts . . . materially  
15 indistinguishable" from a decision of the Supreme Court but reaches a  
16 different result. See Early v. Packer, 537 U.S. at 8 (citation  
17 omitted); Williams v. Taylor, 529 U.S. at 405-06.

18  
19 Under the "unreasonable application" prong of section 2254(d)(1),  
20 a federal court may grant habeas relief "based on the application of a  
21 governing legal principle to a set of facts different from those of  
22 the case in which the principle was announced." Lockyer v. Andrade,  
23 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537  
24 U.S. at 24-26 (state court decision "involves an unreasonable  
25 application" of clearly established federal law if it identifies the  
26 correct governing Supreme Court law but unreasonably applies the law  
27 to the facts).

28 ///

1            "In order for a federal court to find a state court's application  
2 of [Supreme Court] precedent 'unreasonable,' the state court's  
3 decision must have been more than incorrect or erroneous." Wiggins v.  
4 Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state  
5 court's application must have been 'objectively unreasonable.'" Id.  
6 at 520-21 (citation omitted); see also Waddington v. Sarausad, 555  
7 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th  
8 Cir. 2004), cert. dismiss'd, 545 U.S. 1165 (2005). "Under § 2254(d), a  
9 habeas court must determine what arguments or theories supported,  
10 . . . or could have supported, the state court's decision; and then it  
11 must ask whether it is possible fairminded jurists could disagree that  
12 those arguments or theories are inconsistent with the holding in a  
13 prior decision of this Court." Harrington v. Richter, 562 U.S. 86,  
14 101 (2011). This is "the only question that matters under §  
15 2254(d)(1)." Id. at 102 (citation and internal quotations omitted).  
16 Habeas relief may not issue unless "there is no possibility fairminded  
17 jurists could disagree that the state court's decision conflicts with  
18 [the United States Supreme Court's] precedents." Id. "As a condition  
19 for obtaining habeas corpus from a federal court, a state prisoner  
20 must show that the state court's ruling on the claim being presented  
21 in federal court was so lacking in justification that there was an  
22 error well understood and comprehended in existing law beyond any  
23 possibility for fairminded disagreement." Id. at 103.

24  
25            In applying these standards to Petitioner's exhausted claims, the  
26 Court looks to the last reasoned state court decision. See Delgadillo  
27 v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Here, the last  
28 reasoned decision is the Court of Appeal's decision on direct review

1 (Respondent's Lodgment 7).

2  
3 Additionally, federal habeas corpus relief may be granted "only  
4 on the ground that [Petitioner] is in custody in violation of the  
5 Constitution or laws or treaties of the United States." 28 U.S.C. §  
6 2254(a). In conducting habeas review, a court may determine the issue  
7 of whether the petition satisfies section 2254(a) prior to, or in lieu  
8 of, applying the standard of review set forth in section 2254(d).  
9 Frantz v. Hazezy, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

10  
11 **DISCUSSION**

12  
13 **I. Petitioner's Claim of Instructional Error Does Not Merit Federal**  
14 **Habeas Relief.**

15  
16 In Ground One, Petitioner argues that the trial court erred by  
17 instructing the jury with CALCRIM 520 without defining the specific  
18 legal duty that Petitioner allegedly failed to perform. The bench  
19 notes to CALCRIM 520 provide that, when the prosecution's theory of  
20 the case is that the defendant committed the murder by failing to  
21 perform a legal duty,<sup>3</sup> the court may give the following bracketed  
22 language:

23 ///

24  
25 <sup>3</sup> As the California Court of Appeal stated, "It is  
26 unclear from the record whether the prosecution's theory of the  
27 case was premised on an intentional act or an intentional failure  
28 to act - the prosecutor argued both that the defendant committed  
an intentional act by keeping the dogs when he knew the dogs were  
dangerous and failed to 'get rid of the dogs or keep the dogs  
safely confined.'" People v. Jackson, 2016 WL 1583600, at \*3.

1 [(A/An) \_\_\_\_\_ <insert description of person owing duty>  
2 has a legal duty to (help/care for/rescue/warn/maintain the  
3 property of/ \_\_\_\_\_ <insert other required action(s)>)  
4 \_\_\_\_\_ <insert description of decedent/person to whom duty  
5 is owed>.

6  
7 If you conclude that the defendant owed a duty to \_\_\_\_\_  
8 <insert name of decedent>, and the defendant failed to  
9 perform that duty, (his/her) failure to act is the same as  
10 doing a negligent or injurious act.]

11  
12 See CALCRIM 520. In Petitioner's case, the trial court did not  
13 instruct the jury with the bracketed language. Instead, the court  
14 inserted the phrase "or failed to do a required act" in the standard  
15 CALCRIM 520 instruction as follows:

16  
17 The defendant is charged in Count 1 with murder. ¶ To prove  
18 the defendant is guilty of this crime, the People must prove  
19 that:

20  
21 1. The defendant committed an act or failed to do a  
22 required act that caused the death of another person; ¶ AND

23  
24 2. When the defendant acted or failed to do a required act,  
25 he had a state of mind called malice aforethought.

26  
27 There are two kinds of malice aforethought, express malice  
28 and implied malice. Proof of either is sufficient to

1 establish the state of mind required for murder. ¶ The  
2 defendant acted with *express malice* if he unlawfully  
3 intended to kill. ¶ The defendant acted with *implied malice*  
4 if:

5  
6 1. He intentionally committed an act or failed to do a  
7 required act;

8  
9 2. The natural and probable consequences of the act or  
10 failure to do a required act were dangerous to human life;

11  
12 3. At the time he acted or failed to do a required act, he  
13 knew his act or failure to do a required act was dangerous  
14 to human life; ¶ AND

15  
16 4. He deliberately acted with conscious disregard for  
17 human life.

18  
19 Malice aforethought does not require hatred or ill will  
20 toward the victim. It is a mental state that must be formed  
21 before the act that causes the death is committed. It does  
22 not require deliberation or the passage of any particular  
23 period of time.

24  
25 An act or failure to do a required act causes death if the  
26 death is the direct, natural and probable consequence of the  
27 act or failure to do a required act and the death would not  
28 have happened without the act or failure to do a required

1 act. A natural and probable consequence is one that a  
2 reasonable person would know is likely to happen if nothing  
3 unusual intervenes. In deciding whether a consequence is  
4 natural and probable, consider all the circumstances  
5 established by the evidence.

6  
7 There may be more than one cause of death. An act or  
8 failure to do a required act causes death only if it is a  
9 substantial factor in causing the death. A substantial  
10 factor is more than a trivial or remote factor. However, it  
11 does not need to be the only factor that caused the death.

12 ¶ If you find the defendant guilty of murder, it is murder  
13 of the second degree.

14  
15 See C.T. 459-60 (emphasis added); R.T. 2164-66.

16  
17 Petitioner argues that trial court's failure to define the  
18 specific legal duty Petitioner owed to Devitt, combined with the trial  
19 court's use of CALCRIM 580 (defining involuntary manslaughter),  
20 assertedly lowered the burden of proof for second degree murder.  
21 Petitioner argues that the instructions permitted the jury to find  
22 malice where only ordinary negligence existed and where Petitioner had  
23 created only a risk of serious bodily injury (rather than a danger to  
24 human life). See Petition, Ex. A, pp. 21-31 (citing, inter alia,  
25 People v. Knoller, 41 Cal. 4th 139, 156, 59 Cal. Rptr. 3d 157, 158  
26 P.3d 731 (2007) ("We conclude that a conviction for second degree  
27 murder, based on a theory of implied malice, requires proof that a  
28 defendant acted with conscious disregard of the danger to human

1 life.")).

2  
3 The California Court of Appeal rejected Petitioner's claim,  
4 finding that "the jury was properly instructed on the elements of  
5 second degree murder" (Respondent's Lodgment 7, p. 6). While the  
6 Court of Appeal conceded that the instructions "would have been more  
7 complete" if the trial court had explicitly instructed the jury on the  
8 legal duty Petitioner owed to Devitt to exercise reasonable control  
9 over the dogs, any error in failing to make the instructions "more  
10 complete" was harmless (id. at p. 7). The Court of Appeal reasoned  
11 that the existence of a legal duty is a matter of law to be decided by  
12 the court, and the trial court's addition of the "failure to do a  
13 required act" language necessarily reflected the court's determination  
14 that Petitioner owed Devitt a legal duty. See id. at pp. 7-9. The  
15 Court of Appeal also reasoned that, in light of the evidence adduced  
16 at trial, it was not reasonably probable that a different result would  
17 have occurred if the trial court had defined the specific duty owed:  
18

19 The evidence established that [Petitioner] had notice his  
20 dogs were jumping over his fence, attacking passersby, and  
21 that he failed to exercise ordinary care by failing to  
22 remedy the situation. In closing, the prosecutor argued to  
23 the jury that "[i]t is the owner's job to keep us safe[,]"  
24 when the owner knows his dogs are dangerous, and have

25 ///

26 ///

27 ///

28 ///



1 attacked people. . . .<sup>4</sup> The evidence left no doubt that  
2 [Petitioner] owed a duty to take reasonable precautions to  
3 control his dangerous dogs, that he failed to do so, and  
4 that his failure caused the victim's death.

5  
6 See id. at p. 9.

7  
8 **A. Governing Legal Standards**

9  
10 "[I]nstructions that contain errors of state law may not form the  
11 basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333,  
12 342 (1993); see also Estelle v. McGuire, 502 U.S. 62, 71-72 (1991)  
13 ("the fact that the instruction was allegedly incorrect under state  
14 law is not a basis for habeas relief"); Dunckhurst v. Deeds, 859 F.2d  
15 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a  
16 ground cognizable in a federal habeas corpus proceeding"). When a  
17 federal habeas petitioner challenges the validity of a state jury  
18 instruction, the issue is "whether the ailing instruction by itself so  
19 infected the entire trial that the resulting conviction violates due  
20 process." Estelle v. McGuire, 502 U.S. at 72; Clark v. Brown, 450  
21 F.3d 898, 904 (9th Cir.), cert. denied, 549 U.S. 1027 (2006). The  
22 court must evaluate the alleged instructional error in light of the  
23 overall charge to the jury. Middleton v. McNeil, 541 U.S. 433, 437  
24 (2004); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Villafuerte v.

25 \_\_\_\_\_  
26 <sup>4</sup> Similarly, the defense argued in closing that for  
27 second degree murder the prosecution needed to prove that  
28 Petitioner acted with implied malice by intentionally committing  
an act or failing to do a required act, which counsel "guess[ed]  
. . . would be harboring a violent dog" (R.T. 2267).

1 Stewart, 111 F.3d 616, 624 (9th Cir. 1997), cert. denied, 522 U.S.  
2 1079 (1998). "The relevant inquiry is 'whether there is a reasonable  
3 likelihood that the jury has applied the challenged instruction' in an  
4 unconstitutional manner." Houston v. Roe, 177 F.3d 901, 909 (9th Cir.  
5 1999), cert. denied, 528 U.S. 1159 (2000) (quoting Boyde v.  
6 California, 494 U.S. 370, 380 (1990)). In challenging the failure to  
7 give an instruction, a habeas petitioner faces an "especially heavy"  
8 burden. Henderson v. Kibbe, 431 U.S. at 155.

9  
10 **B. Analysis**

11  
12 The trial court's alleged error in failing to define for the jury  
13 Petitioner's specific legal duty does not entitle Petitioner to  
14 federal habeas relief. The trial court instructed the jury on all of  
15 the required elements of second degree murder, including the  
16 requirement that Petitioner have acted with express or implied malice.  
17 See C.T. 459; R.T. 2164-66. The trial court correctly defined express  
18 and implied malice, including the "conscious disregard for human life"  
19 state of mind required for implied malice. See id. The Court of  
20 Appeal determined, as a matter of California law, that the jury was  
21 properly instructed on second degree murder (Respondent's Lodgment 7,  
22 p. 6). This Court cannot revisit that ruling. See Waddington v.  
23 Sarausad, 555 U.S. 179, 192 n.5 (2009) ("We have repeatedly held that  
24 it is not the province of a federal habeas court to reexamine state-  
25 court determinations on state-law questions") (citation and internal  
26 quotations omitted); Bradshaw v. Richey, 546 U.S. 74, 76 (2005);  
27 Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the  
28 ultimate expositors of state law").

1 Contrary to Petitioner's argument, nothing in the jury  
2 instructions conceivably could have permitted the jury to convict  
3 Petitioner of second degree murder without finding the requisite  
4 malice. Indeed, in addition to defining express and implied malice  
5 accurately, the jury instructions also clearly and correctly explained  
6 that a person who "commits an unlawful killing but does not intend to  
7 kill and does not act with conscious disregard for human life" is  
8 guilty of involuntary manslaughter rather than murder. See C.T. 460;  
9 R.T. 2166-67.<sup>5</sup> Thus, the Court of Appeal's rejection of Petitioner's  
10 instructional claim was not unreasonable. Contrary to Petitioner's  
11 argument, there is no reasonable likelihood that the jury applied the  
12 instructions to lessen or relieve the prosecution of its burden of  
13 proving malice. Under the instructions as given, a finding that  
14 Petitioner acted with only "ordinary negligence," or that he created  
15 only a risk of serious bodily injury, could not have resulted in a  
16 verdict of guilty on the murder charge. The jury is presumed to have  
17 followed the court's instructions. See Weeks v. Angelone, 528 U.S.  
18 225, 226 (2000).

19  
20 For the foregoing reasons, the California Court of Appeal's  
21 rejection of Petitioner's claim of instructional error was not  
22 contrary to, or an unreasonable application of, any "clearly

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23  
24 <sup>5</sup> The legal issue of Petitioner's duty to Devitt was  
25 distinct from the factual issue of whether Petitioner acted with  
26 implied malice. As the Court of Appeal held, it was for the  
27 trial court to decide whether Petitioner owed Devitt a duty under  
28 California law. See Respondent's Lodgment 7, p. 7 (citing  
Kentucky Fried Chicken of Cal., Inc. v. Superior Court, 14 Cal.  
4th 814, 819, 59 Cal. Rptr. 2d 756, 927 P.2d 1260 (1997) ("the  
existence of a duty is a question of law for the court")  
(citations omitted)).

1 established Federal law as determined by the Supreme Court of the  
2 United States." See 28 U.S.C. § 2254(d); Harrington v. Richter, 562  
3 U.S. 86, 101 (2011). Petitioner is not entitled to federal habeas  
4 relief on this claim.

5  
6 **II. Petitioner's Challenge to the Sufficiency of the Evidence to**  
7 **Support the Second Degree Murder Conviction Does Not Merit**  
8 **Federal Habeas Relief.**

9  
10 In Ground Two, Petitioner argues that the evidence was  
11 constitutionally insufficient to support a conviction for second  
12 degree murder. Specifically, Petitioner argues that the evidence was  
13 insufficient to support the conclusion that Petitioner acted with  
14 implied malice.

15  
16 **A. Governing Legal Principles**

17  
18 On habeas corpus, the Court's inquiry into the sufficiency of  
19 evidence is limited. Evidence is sufficient unless the charge was "so  
20 totally devoid of evidentiary support as to render [Petitioner's]  
21 conviction unconstitutional under the Due Process Clause of the  
22 Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir.  
23 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations  
24 omitted). A conviction cannot be disturbed unless the Court  
25 determines that no "rational trier of fact could have found the  
26 essential elements of the crime beyond a reasonable doubt." Jackson  
27 v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it  
28 was "so unsupportable as to fall below the threshold of bare

1 rationality.” Coleman v. Johnson, 566 U.S. 650, 132 S. Ct. 2060, 2065  
2 (2012).

3  
4 Jackson v. Virginia establishes a two-step analysis for a  
5 challenge to the sufficiency of the evidence. United States v.  
6 Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). “First, a  
7 reviewing court must consider the evidence in the light most favorable  
8 to the prosecution.” Id. (citation omitted); see also McDaniel v.  
9 Brown, 558 U.S. 120, 133 (2010).<sup>6</sup> At this step, a court “may not  
10 usurp the role of the trier of fact by considering how it would have  
11 resolved the conflicts, made the inferences, or considered the  
12 evidence at trial.” United States v. Nevils, 598 F.3d at 1164  
13 (citation omitted). “Rather, when faced with a record of historical  
14 facts that supports conflicting inferences a reviewing court must  
15 presume - even if it does not affirmatively appear in the record -  
16 that the trier of fact resolved any such conflicts in favor of the  
17 prosecution, and must defer to that resolution.” Id. (citations and  
18 internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct.  
19 at 2064 (“Jackson leaves [the trier of fact] broad discretion in  
20 deciding what inferences to draw from the evidence presented at trial,  
21 requiring only that [the trier of fact] draw reasonable inferences  
22 from basic facts to ultimate facts”) (citation and internal quotations  
23 omitted); Cavazos v. Smith, 565 U.S. 1, 2 (2011) (“it is the  
24 responsibility of the jury - not the court - to decide what  
25

---

26  
27 <sup>6</sup> The Court must conduct an independent review of the  
28 record when a habeas petitioner challenges the sufficiency of the  
evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir.  
1997).

1 conclusions should be drawn from evidence admitted at trial"). The  
2 State need not rebut all reasonable interpretations of the evidence or  
3 "rule out every hypothesis except that of guilt beyond a reasonable  
4 doubt at the first step of Jackson [v. Virginia]." United States v.  
5 Nevils, 598 F.3d at 1164 (citation and internal quotations omitted).  
6 Circumstantial evidence and the inferences drawn therefrom can be  
7 sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112,  
8 1114-15 (9th Cir. 2011).

9  
10 At the second step, the court "must determine whether this  
11 evidence, so viewed, is adequate to allow any rational trier of fact  
12 to find the essential elements of the crime beyond a reasonable  
13 doubt." United States v. Nevils, 598 F.3d at 1164 (citation and  
14 internal quotations omitted; original emphasis). A reviewing court  
15 "may not ask itself whether *it* believes that the evidence at the trial  
16 established guilt beyond a reasonable doubt." Id. (citations and  
17 internal quotations omitted; original emphasis).

18  
19 In applying these principles, a court looks to state law for the  
20 substantive elements of the criminal offense, but the minimum amount  
21 of evidence that the Constitution requires to prove the offense "is  
22 purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at  
23 2064.

24  
25 **B. The Elements of Second Degree Murder**

26  
27 Under California law, second degree murder is defined as "the  
28 unlawful killing of a human being with malice aforethought but without

1 the additional elements, such as willfulness, premeditation, and  
2 deliberation, that would support a conviction of first degree murder."  
3 People v. Knoller, 41 Cal. 4th 139, 151, 59 Cal. Rptr. 3d 157, 158  
4 P.3d 731 (2007) (citations omitted). "Malice is implied when the  
5 killing is proximately caused by an act the natural consequences of  
6 which are dangerous to life, which act was deliberately performed by a  
7 person who knows that his conduct endangers the life of another and  
8 who acts with conscious disregard for life." Id. at 152 (citations  
9 and quotations omitted); see also People v. Watson, 30 Cal. 3d 290,  
10 296-97, 179 Cal. Rptr. 43, 637 P.2d 279 (1981) (citations omitted);  
11 see also Cal. Penal Code § 188 (malice may be express or implied).  
12 For example, "[a] person who, knowing the hazards of drunk driving,  
13 drives a vehicle while intoxicated and proximately causes the death of  
14 another may be convicted of second degree murder under an implied  
15 malice theory." People v. Batchelor, 229 Cal. App. 4th 1102, 1112,  
16 178 Cal. Rptr. 3d 28 (2014).

17  
18 Implied malice murder need not be premised on an affirmative act.  
19 "The omission of a duty is in the law the equivalent of an act [], and  
20 thus, a defendant's failure to perform an act that he or she has a  
21 legal duty to perform is identical to the defendant's affirmative  
22 performance of an act." People v. Latham, 203 Cal. App. 4th 319, 327,  
23 137 Cal. Rptr. 3d 443, (2012) (citation and internal quotation marks  
24 omitted); People v. Burden, 72 Cal. App. 3d 603, 618, 140 Cal. Rptr.  
25 282 (1977) ("common law does not distinguish between homicide by act  
26 and homicide by omission").

27 ///

28 ///

1 "When a criminal statute does not set forth a legal duty to act  
2 by its express terms, liability for a failure to act must be premised  
3 on the existence of a duty found elsewhere," such as a "criminal or  
4 civil statute" or "a common law duty based on the legal relationship  
5 between the defendant and the victim." People v. Heitzman, 9 Cal. 4th  
6 189, 198, 37 Cal. Rptr. 2d 236, 886 P.2d 1229 (1994) (citations  
7 omitted). Here, the trial court implicitly found, and the Court of  
8 Appeal explicitly found, that Petitioner owed Devitt a duty to take  
9 reasonable precautions to control Petitioner's dangerous dogs. See  
10 Respondent's Lodgment 7, pp. 7-9.<sup>7</sup>

---

11  
12 <sup>7</sup> The existence of a legal duty for a dog owner to  
13 exercise reasonable control over a dangerous dog for the  
14 protection of others is found in both California criminal statute  
15 and in California common law. Under California Penal Code  
16 section 399, a felony occurs when any person "owning or having  
17 custody or control of a mischievous animal, knowing its  
18 propensities, willfully suffers it to go at large, or keeps it  
19 without ordinary care, and the animal, while so at large, or  
20 while not kept with ordinary care," causes serious bodily injury  
21 or death to another. See Cal. Penal Code § 399. "The basic  
22 purpose of section 399 is to protect people against fatal attacks  
23 by 'mischievous animals,' where the victim is in no way at fault  
24 for the attack. [] It does so by punishing those who know their  
25 animals are 'mischievous' but allow them to run free or keep them  
26 in a negligent manner. [] Section 399 . . . implies that a  
27 'mischievous' animal is one that may be dangerous to others if  
28 allowed to run free or kept in a negligent manner. Knowledge of  
an animal's 'mischievous propensities' therefore puts an owner on  
notice of such danger or risk of harm, and his or her liability  
under the statute arises from the failure to act reasonably with  
knowledge of this risk." People v. Berry, 1 Cal. App. 4th 778,  
783, 786, 2 Cal. Rptr. 2d 416 (1991) (internal citations  
omitted); see also People v. Flores, 216 Cal. App. 4th 251, 259,  
156 Cal. Rptr. 3d 648 (2013) (discussing same). Similarly,  
California common law provides that an animal's owner or keeper  
owes a duty of care to secure the animal properly where it is  
reasonably expected that an injury could otherwise result. See,  
e.g., Drake v. Dean, 15 Cal. App. 4th 915, 925-26, 19 Cal. Rptr.  
2d 325 (1993) (discussing theories of liability for animal

(continued...)





1 barricading more, as much as [he] could" (C.T. 391).<sup>8</sup>

2  
3 Petitioner also knew that on multiple occasions when the dogs  
4 jumped over the fence they had attacked those who passed by his  
5 property. Henry Walden testified that in March of 2012 Walden was  
6 delivering mail when one of Petitioner's aggressive dogs was outside  
7 Petitioner's yard (R.T. 400-05, 413, 416). Walden previously had seen  
8 this dog jumping up along the fence line while Walden was delivering  
9 mail (R.T. 419). While Walden was in his mail truck near Petitioner's  
10 mailbox, the dog attacked and bit the front and back bumpers of the  
11 mail truck (R.T. 403-05, 413-16). The dog then followed Walden for  
12 approximately half a mile (R.T. 405-06). Walden reported the  
13 incident, and Petitioner's mail was withheld until Petitioner signed  
14 and returned a "dog letter" to resume delivery (R.T. 407-10, 416-17).

15  
16 Deputy Efrain Godoy talked to Petitioner on January 13, 2013,  
17 concerning an attack on two horse riders (Epi Maldonado and Eladio

18  
19 <sup>8</sup> In interviews that were played for the jury (R.T. 1640-  
20 45), Petitioner's neighbors Xavier Villegas and Gloria Smith told  
21 police they saw "a lot of pit bulls" (at least five) at  
22 Petitioner's house that jumped the fence in the month these  
23 neighbors had lived by Petitioner (C.T. 370-71, 374, 378). Every  
24 night, the dogs reportedly would jump out of the yard and run in  
25 a pack (C.T. 379-81). Villegas talked to Petitioner twice about  
26 the dogs (C.T. 373-74). Petitioner had claimed he was fixing a  
27 pen in the back for the dogs (C.T. 372-73). Villegas said he  
28 told Petitioner that one dog bit a girl on a horse (C.T. 371).  
Villegas said the dogs sat on top of a blue car and waited for  
their prey (C.T. 373). The dogs had chased some kids who were  
picking up trash in the desert (C.T. 373). The dogs had attacked  
a horse twice (C.T. 375). Villegas said the dogs also rushed and  
"attacked" him, Smith and their dog (C.T. 374). Villegas used a  
pellet gun to keep the dogs away and carried a machete whenever  
he retrieved his own mail (C.T. 374).

1 Lopez) earlier that day (R.T. 927-31, 941-42). Godoy told Petitioner  
2 that horse riders had reported that Petitioner's pit bulls "attacked  
3 their horses and the riders themselves" (R.T. 931). Petitioner told  
4 Godoy that every time Petitioner supposedly tried to secure the dogs  
5 inside his property the dogs still got out (R.T. 931-32).<sup>9</sup>

6  
7 Epi Maldonado testified that he and his friend Eladio Lopez were  
8 riding horses on a street near Petitioner's house on January 13, 2013,  
9 when five or more pit bulls attacked them (R.T. 631-34, 652-60).  
10 Petitioner was there (R.T. 634). The dogs eventually surrounded  
11 Maldonado and Lopez (R.T. 635-37). The dogs were trying to bite  
12 Maldonado and Lopez, but the horses were jumping and would not let the  
13 dogs bite (R.T. 636-37, 639, 643-44). One or two dogs attacked  
14 Maldonado's horse on the back of the leg and the horse kicked a dog  
15 (R.T. 637-38, 661-62, 668-69). Another dog bit Maldonado's boot (R.T.  
16 637-38, 643). Meanwhile, other dogs were attacking Lopez and his  
17 horse (R.T. 639). According to Maldonado, Petitioner threw two rocks  
18 at Maldonado's head and yelled, "Get out of here. You guys don't live  
19 here" (R.T. 639-43, 646, 663-68). Lopez reportedly had to move his  
20 head to avoid being hit on the head by the rocks (R.T. 642). Lopez  
21 fled on his horse, and all of the dogs ran after him (R.T. 644-45).

22  
23 <sup>9</sup> When Animal Control officer Cornelious Chisom went to  
24 Petitioner's house on January 22 to investigate the January 13  
25 attack, Chisom saw two light brown pit bulls on the property  
26 (R.T. 948, 950-52, 964, 970). Petitioner acknowledged knowing  
27 about the attack but, contrary to what Petitioner had told Godoy,  
28 Petitioner told Officer Chisom his two dogs were not involved in  
the attack and there were no other dogs on his property (R.T.  
952-55). Also contrary to what Petitioner had told Godoy,  
Petitioner told Chisom that Petitioner's property was secure and  
Petitioner claimed that his dogs never get out (R.T. 953).

1 Maldonado rode away and called 911 (R.T. 645-47, 649-50; see also C.T.  
2 358-61 (transcript of 911 call played for the jury)). Maldonado  
3 feared that Lopez would get thrown from his horse and be bitten by the  
4 dogs (R.T. 648).

5  
6 Eladio Lopez testified that on January 13, 2013, he was riding  
7 with Maldonado when he saw Petitioner with eight to ten dogs outside a  
8 fence (R.T. 671-72, 680-84, 906-08). As Lopez and Maldonado got  
9 closer to Petitioner, the dogs ran toward them barking (R.T. 671-72,  
10 684, 909). Lopez and his horse began running from one place to  
11 another on the street trying to avoid the dogs (R.T. 672-73, 685, 909,  
12 912-13). The dogs bit Lopez's horse in the back when Lopez and his  
13 horse ran, while another dog was trying to bite Lopez or his horse in  
14 the front (R.T. 674-78, 681, 911-12). Lopez saw Petitioner throw some  
15 rocks but never heard Petitioner say anything (R.T. 676-77, 910).  
16 Lopez and his horse ran until they reached a house where a woman  
17 scared the dogs away with a piece of wood (R.T. 678). The legs of  
18 Lopez's horse were "completely full of blood" and the horse had bite  
19 marks in the back (R.T. 678, 912). The dogs did not bite Lopez; Lopez  
20 protected himself by hitting the dogs with a rope (R.T. 911-12).

21  
22 Petitioner's neighbor Jon Sauka testified that, in early 2013, he  
23 saw three pit bulls surrounding and attacking a horse and rider on the  
24 street in front of Sauka's house (R.T. 914-23). All three dogs were  
25 jumping up and biting the horse in the rear (R.T. 916-17, 924). The  
26 horse looked panicked and the rider looked scared (R.T. 917-18).  
27 Sauka and two others threw rocks and swung boards at the dogs to try  
28 to get them to stop (R.T. 918-19). Sauka did not see the rider get

1 bitten - Sauka thought the dogs could not get up high enough (R.T.  
2 924).

3  
4 Cheree Crisp testified she was attacked by pit bulls while riding  
5 her horse in April of 2013 (R.T. 998-99, 1003, 1028-29). Five brown  
6 pit bulls came out from a house and jumped through an opening at the  
7 top of a fence (R.T. 1004-05, 1020-23, 1030-31). The dogs then  
8 started biting at Crisp and at her horse, and one dog jumped onto the  
9 saddle atop the back of the horse, causing the horse to throw Crisp  
10 (R.T. 1005-06, 1031-33). Crisp fell to the ground, and her horse fell  
11 on top of her (R.T. 1006-07). The dogs continued biting at the horse  
12 (R.T. 1007). Crisp saw all five of the dogs bite her horse on the  
13 face and the legs (R.T. 1007). Crisp let go of her horse to permit  
14 the horse to run away so the dogs would not kill the horse (R.T. 1008,  
15 1034). The dogs were aggressive and did not stop biting the horse  
16 until the horse escaped (R.T. 1008-09). Two dogs were actually  
17 hanging off the back end of the horse as the horse ran away (R.T.  
18 1010, 1034-35). Crisp herself was bit in her right calf (R.T.  
19 1008-09, 1035-36). When Crisp later found her horse, the horse had  
20 gashes in her back legs, and pieces of skin missing from her nose and  
21 mouth (R.T. 1012-17). Crisp identified three of the four dogs  
22 recovered from Petitioner's garage as the same dogs that had attacked  
23 her and her horse (R.T. 1025-28, 1333, 1337-38, 1367-68).

24  
25 Ronda Mortimer, Crisp's neighbor and friend, testified that Crisp  
26 ran to her door on the day of the attack on Crisp and told her where  
27 the attack happened (R.T. 1045). Mortimer knew the house was  
28 Petitioner's house; Petitioner is the uncle of Mortimer's

1 granddaughter (R.T. 1045-46). Mortimer called the Sheriff's  
2 Department and made a report (R.T. 1046). The next day, Mortimer went  
3 with her son to Petitioner's house and told Petitioner that Crisp had  
4 been attacked by pit bulls (R.T. 1046). In response, Petitioner  
5 denied that he had any pit bulls (R.T. 1046-47). Yet, while Mortimer  
6 was at Petitioner's house, a pit bull jumped at the fence trying to  
7 "get at" Mortimer and her son (R.T. 1046-47). Petitioner then claimed  
8 that his dogs were in the yard and had not gotten out, and also  
9 claimed his dogs were mixed breed dogs rather than pit bulls (R.T.  
10 1047). While visiting Petitioner that day, however, Mortimer did see  
11 a pit bull there (R.T. 1047).

12  
13 Neighbor Adalberto Farias testified that he twice had "incidents"  
14 riding his horse by Petitioner's house in April of 2013 (R.T.  
15 1054-58). During the first incident, Farias was riding his horse when  
16 dogs started barking, one dog jumped through a hole in Petitioner's  
17 fence and three other dogs followed (R.T. 1056-61, 1070-72). These  
18 dogs were aggressive, so Farias let go of his reins and let the horse  
19 run away with him (R.T. 1058, 1062, 1070). The dogs chased, but  
20 Farias and his horse got away (R.T. 1062-63). Farias did not report  
21 that incident (R.T. 1063-64). The following week, Farias again passed  
22 by on his horse and the same dogs again came out after him (R.T.  
23 1063-65, 1071-72). One of these dogs came from the desert; the rest  
24 came from Petitioner's property (R.T. 1072). Again, the dogs were  
25 aggressive and again Farias fled on his horse (R.T. 1065-66). Farias  
26 stopped at the house of Petitioner's neighbor and talked to the  
27 neighbor concerning the incidents (R.T. 1066-69, 1073-75). Farias  
28 offered to give Petitioner some chain link fencing, because Farias

1 feared what otherwise would occur (R.T. 1066-69, 1073-75). Farias did  
2 not want Animal Control to get the dogs, but he also did not want  
3 anyone to get hurt (R.T. 1066).

4  
5 Richard Torrez was the neighbor with whom Farias spoke (R.T.  
6 1204-11). Torrez said that Farias told him he had some problems with  
7 dogs getting out at Petitioner's house (R.T. 1211-13). Torres said  
8 Farias was "real nice" and offered assistance and material to repair  
9 Petitioner's fence (R.T. 1213-14). Torrez initially denied that he  
10 had relayed Farias' message to Petitioner, but Torrez later admitted  
11 that he had a conversation with Petitioner concerning the matter (R.T.  
12 1214, 1223; see also C.T. 363-68 (transcript of two interviews of  
13 Torrez where Torrez said that he told Petitioner about Farias'  
14 conversation and told Petitioner they needed to "see about . . .  
15 securing them dogs," but Petitioner "didn't say too much").

16  
17 Another neighbor, Karla Rosales, testified of having ridden  
18 tandem on a horse with her husband, Rodrigo Rodriguez, in front of  
19 Petitioner's house a week before the killing (R.T. 1224-28). Rosales  
20 saw Petitioner outside in front of the house (R.T. 1226, 1232). Six  
21 "viciously behaving" pit bulls got out of the fence, one by one, and  
22 started attacking Rosales and the horse (R.T. 1227, 1230-31, 1233-40,  
23 1242). In addition to biting the horse, the dogs bit at Rosales' leg,  
24 which was the only human body part the dogs could reach (R.T. 1236).  
25 Petitioner was watching, but said nothing and did nothing to try to  
26 stop the dogs or otherwise help Rosales (R.T. 1232, 1236-38, 1243-44).  
27 The horse went wild and tried to get away, and the dogs followed and  
28 tried to continue the attack (R.T. 1240-41). The dogs stopped

1 following only after the horse got to another house where people were  
2 around (R.T. 1241-42). Rosales and Rodriguez were not injured, but  
3 the horse suffered bites and was bleeding (R.T. 1244-46). Rosales  
4 reported the attack when she got home (R.T. 1245).<sup>10</sup>

5  
6 From the evidence of these many prior attacks, a jury could infer  
7 that Petitioner knew his dogs were vicious. A jury could also infer  
8 that, by continuing to harbor these dogs after Petitioner knew of  
9 these attacks (and by failing to keep the dogs safely secured),  
10 Petitioner acted (or failed to do a required act) that caused the  
11 death of Devitt.

12  
13 Petitioner argues that the evidence did not support the  
14 conclusion that, by harboring and failing to control or secure the  
15 dogs, Petitioner acted with implied malice (i.e., that he deliberately  
16 engaged in behavior that was dangerous to human life, knew his conduct  
17 was dangerous to human life, and acted with conscious disregard for  
18 human life). Petitioner argues that there were no prior instances in  
19 which the dogs had caused "significant injuries" to any human or the

---

21 <sup>10</sup> Rodrigo Rodriguez also testified concerning the attack  
22 (R.T. 1248-50). Rodriguez testified that, as they rode by  
23 Petitioner's house, approximately five big pit bulls jumped over  
24 Petitioner's fence one by one and attacked the horse and bit  
25 Rosales' boot (R.T. 1250-51). The dogs were not going after  
26 Rodriguez, only his wife (R.T. 1251, 1258-59). The dogs were  
27 biting and jumping at Rosales' legs (R.T. 1252, 1256). Rodriguez  
28 had to make the horse run away from the dogs (R.T. 1252-53). He  
was afraid they would fall from the horse and get attacked by the  
dogs (R.T. 1253). The dogs ran back to Petitioner's house after  
the attack (R.T. 1257-58). Rodriguez did not say anything to  
Petitioner regarding the attack (R.T. 1262-63). Rodriguez did  
not want to confront Petitioner (R.T. 1264).



1 death of any animal (Id., pp. 33-36). Further, Petitioner argues he  
2 had "demonstrated an appreciation for the problem of the dogs leaving  
3 the fenced area and continually tried to correct it" (Id., p. 34).<sup>11</sup>  
4

5 Viewing the evidence in the light most favorable to the  
6 verdict,<sup>12</sup> the evidence was sufficient for a rational jury to conclude  
7 beyond a reasonable doubt that, by keeping and harboring dogs with  
8 vicious propensities, and by failing to secure those dogs, Petitioner  
9 deliberately engaged in conduct he knew was dangerous to human life  
10 and he acted with conscious disregard for human life. Petitioner  
11 admittedly knew that pit bulls generally are stronger than average  
12 dogs and have a more "potent" bite (R.T. 1809-10, 1862). Based on  
13 repeated, recent experiences, Petitioner plainly knew that his pit  
14

---

15 <sup>11</sup> Petitioner made similar arguments at trial. Petitioner  
16 argued that he had no reason to believe the dogs would ever  
17 attack and hurt a human being since the prior attacks had  
18 involved other animals (i.e., horses who had riders on them), had  
19 not resulted in any significant injuries to people, and  
20 Petitioner's prior contacts with Animal Control had not resulted  
21 in any findings that the dogs were "violent" (R.T. 2247-73). By  
22 its verdict, the jury rejected Petitioner's arguments.

23 <sup>12</sup> In his trial testimony, Petitioner suggested that the  
24 many witnesses against him had lied or were otherwise wrong in  
25 their testimony, and that Petitioner really had no reason  
26 whatsoever to know his dogs were dangerous (R.T. 1803-84). The  
27 jury need not have believed Petitioner's arguably improbable  
28 testimony, and, in any event, this Court cannot revisit the  
jury's credibility determinations. See McDaniel v. Brown, 538  
U.S. 120, 131-34 (2010) (the reviewing federal court must presume  
that the trier of fact resolved all inconsistencies in favor of  
the prosecution, and must defer to that resolution); United  
States v. Franklin, 321 F.3d 1231, 1239-40 (9th Cir.), cert.  
denied, 540 U.S. 858 (2003) (in reviewing the sufficiency of the  
evidence, a court does not "question a jury's assessment of  
witnesses' credibility" but rather presumes that the jury  
resolved conflicting inferences in favor of the prosecution).

1 bulls were dangerous to others. From these experiences, Petitioner  
2 was on actual notice that his dogs were territorial, aggressive and  
3 ferocious. There was even evidence that Petitioner, too, was  
4 territorial and utterly heedless of the danger to others. Petitioner  
5 watched passively as his dogs attacked Rosales (R.T. 1232, 1236-38,  
6 1243-44). Reportedly, Petitioner even joined his dogs in attacking  
7 Maldonado, throwing rocks at Maldonado's head and yelling, "Get out of  
8 here. You guys don't live here" (R.T. 639-43, 646, 663-68).<sup>13</sup>  
9 Petitioner testified that he did not think his dogs behaved  
10 inappropriately when they attacked Maldonado and Lopez, even though  
11 Petitioner admitted that the dogs' behavior toward Maldonado and Lopez  
12 had been "violent" (R.T. 1823, 1864).

13  
14 Furthermore, Petitioner manifested a culpable state of mind  
15 through his repeated displays of dishonesty. When confronted by  
16 Officer Chisom concerning the attack on Maldonado and Lopez,  
17 Petitioner falsely denied the dogs were his and falsely claimed his  
18 fence was secure (R.T. 952-55). When confronted by Ronda Mortimer  
19 concerning the attack on Crisp, Petitioner falsely claimed that he had  
20 no pit bulls and falsely claimed that his dogs had not gotten out of  
21 the fence (R.T. 1046-47). When confronted by Animal Control officers  
22 on the day of Devitt's killing, Petitioner falsely claimed he had no  
23 dogs on the property (R.T. 1310-11, 1378, 1391). Petitioner barred  
24 officers from entering his property during the initial investigation  
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27 <sup>13</sup> Deputy Godoy testified that Petitioner was mad at the  
28 fact that people rode horses on the public street in question,  
which Petitioner erroneously regarded as his "private road" (R.T.  
932-33).

1 (R.T. 1311). Petitioner warned these officers that "whoever entered  
2 the property was going into the lion's den" (R.T. 1391). In fact, on  
3 the day of the killing, Petitioner had seen his dogs return home  
4 bearing bloodstains on their fur (R.T. 1842). Petitioner realized his  
5 dogs may have been involved in an attack, so he put the dogs in the  
6 garage in an attempt to conceal the dogs from view and to prevent  
7 their apprehension (R.T. 1844).<sup>14</sup> However, during an interview with  
8 sheriff's deputies on the day of the killing, Petitioner denied that  
9 the dogs in his garage were even his dogs (R.T. 1910; C.T. 408-29).  
10 Petitioner then claimed that the dogs "live in the desert . . . wild  
11 like lions" (R.T. 1910, C.T. 419).

12  
13 Essentially, Petitioner's argument is that the jury could have or  
14 should have weighed the evidence differently on the issue of implied  
15 malice. However, the conceivability of a different weighing of the  
16 evidence is irrelevant to the constitutional sufficiency of the  
17 evidence. See, e.g., Flores-Ramirez v. Pollard, 2007 WL 205571, at \*4  
18 (E.D. Wisc. Jan. 24, 2007) ("The standard is not whether any rational  
19 jury could have acquitted the petitioner; the standard is whether any  
20 rational jury could have found him guilty"). Viewed in the light most  
21 favorable to the prosecution, a rational jury could have found beyond  
22 a reasonable doubt that Petitioner was guilty of second degree

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27 <sup>14</sup> Petitioner also admitted he had pit bulls in 2006 that  
28 attacked a neighbor's emu and were euthanized because Animal  
Control found out about the attack (R.T. 1862).

1 murder.<sup>15</sup>

2  
3 Like an intoxicated person who decides to drive a car, Petitioner  
4 probably did not expect or intend a fatal consequence from his  
5 decision to keep vicious dogs and to fail to confine them. And, like  
6 the intoxicated person's decision to drive, Petitioner's decision was  
7 not certain to produce a fatal consequence in the near term. Like the  
8 intoxicated person's decision, however, Petitioner's decision was  
9 taken with knowledge of the consequent danger to human life and in  
10 conscious disregard of human life (or so, at least, a rational jury  
11 could conclude on the evidence presented). Cf. People v. Knoller, 41  
12 Cal. 4th 139, 160, 59 Cal. Rptr. 3d 157, 158 P.3d 731 (2007); People  
13 v. Batchelor, 229 Cal. App. 4th at 1113-15.

14  
15 The Court of Appeal's rejection of Petitioner's challenge to the  
16 sufficiency of the evidence was not contrary to, or an unreasonable  
17 application of, any "clearly established Federal law as determined by  
18 the Supreme Court of the United States." See 28 U.S.C. § 2254(d);  
19 Harrington v. Richter, 562 U.S. 86, 101 (2011). Petitioner is not

20  
21 <sup>15</sup> Petitioner argues there "is no difference" between his  
22 murder conviction and a hypothetical murder conviction of the  
23 President of the United States for failing to secure the nation's  
24 borders against murderous foreign terrorists (Traverse at 6-7).  
25 The suggested comparison of the mental states of Petitioner and  
26 the President might be apt if the President had: (1) harbored  
27 particular terrorists in the White House despite knowing of prior  
28 attacks by these same terrorists; (2) personally watched with  
approval as the terrorists attacked innocent passersby on  
Pennsylvania Avenue; (3) joined in the terrorists' attacks  
himself by hurling projectiles at an innocent passerby; and  
(4) lied to law enforcement during ensuing investigations in an  
effort to shield the terrorists from apprehension and to preserve  
their capacity to kill again.



1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of  
3 Appeals, but may be subject to the right of any party to file  
4 objections as provided in the Local Rules Governing the Duties of  
5 Magistrate Judges and review by the District Judge whose initials  
6 appear in the docket number. No notice of appeal pursuant to the  
7 Federal Rules of Appellate Procedure should be filed until entry of  
8 the judgment of the District Court.

9 If the District Judge enters judgment adverse to Petitioner, the  
10 District Judge will, at the same time, issue or deny a certificate of  
11 appealability. Within twenty (20) days of the filing of this Report  
12 and Recommendation, the parties may file written arguments regarding  
13 whether a certificate of appealability should issue.

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